No. 99-1739

IN THE

Supreme Court of the United States

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,
Cross-Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The questions presented in the Cross-Petition filed by the Dallas-Fort Worth International Airport Board ("Board") do not warrant review at this time. The first question – whether the Board's use agreements are preempted by the Airline Deregulation Act ("ADA") – is wholly derivative of the single question presented in the Petition filed by American Airlines, Inc. ("American") (No. 99-1745), which is whether the ADA's preservation of the "proprietary powers and rights" of local governments that own multiple airports allows such governments to allocate particular types of air traffic to specific airports. If this Court grants American's Petition, there will be no need to resolve the first question raised by the Board. If the Court reverses the Fifth Circuit, that action will moot the issue

of the enforceability of the use agreements. And if the Court affirms the Fifth Circuit, that action will effectively nullify section 3.2 of the use agreements as well, for that section does no more than implement the legal requirements the Fifth Circuit held were preempted. As to the Cross-Petition's second question, regarding the Department of Transportation's ("DOT's") construction of the Wright Amendment, the Fifth Circuit's conclusion neither creates a decisional conflict among courts nor raises any issues of national importance.

The best course of action, American respectfully suggests, is to hold the Board's Cross-Petition, as well as the Petition filed by the City of Fort Worth (No. 99-1462),[1] and to grant review on the single question presented in American's Petition because that issue is unquestionably one of nationwide importance on which both the circuits and the Colorado Supreme Court are in conflict. The remaining petitions then can be disposed of as appropriate in light of the Court's disposition of American's Petition.

STATEMENT OF THE CASE

Seeking to portray the use agreements between itself and the major commercial airlines as garden-variety private contracts that are not subject to ADA preemption, the Board glosses over the context in which the use agreements arose. Those agreements are no more akin to private contracts than was the earlier agreement between Dallas and Fort Worth in

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[1]The City of Fort Worth raised three issues in its Petition. The first is the same as the single issue raised in American's Petition. The second is the same as the use agreement issue raised in Board's Cross-Petition. The third involves the preclusive effect of a Texas state court ruling applying the ADA's "proprietary powers and rights" provision to the matters at issue in this case.

1968 – entered into at the behest of the Civil Aeronautics Board ("CAB") – to jointly finance and build DFW Airport, to create the Board to operate DFW Airport on the cities' behalf, and to transfer scheduled passenger service to DFW Airport from the cities' then-existing airports, including Love Field. (American Pet. 5-7). To the contrary, the use agreements were part and parcel of the cities' regional planning effort, which was itself a product of pressure from federal authorities to consolidate passenger service at a single airport (as the Board acknowledges, *see* DFW Board Cross-Pet. at 6-9).

Indeed, the use agreements were critical to implement this consolidation effort. Section 9.5 of the 1968 Regional Airport Concurrent Bond Ordinance ("Ordinance"), which Dallas and Fort Worth concurrently enacted in furtherance of their venture, obliged the cities to

> take such steps as may be necessary, appropriate, *and legally permissible* . . . to provide for the orderly, efficient and effective phase-out at Love Field . . . of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport [*i.e.*, DFW Airport] effective upon the beginning of operations at the Regional Airport.

(American Pet. App. 162a) (emphasis added). At the time of the Ordinance's enactment in 1968, eight federally certificated airlines, including American, provided scheduled passenger service under long-term leases at Love Field. To assure that the CAB-required transfer of scheduled passenger service would occur and that the revenues necessary to finance DFW Airport's debt service and operations would be achieved, the Board in 1970 required each of those federally certificated airlines to execute a Letter Agreement committing to "conduct

[Certificated Air Carrier] services to, from, and at [DFW] Airport to the extent required under the terms of the [Ordinance]" (American Record Excerpts, Tab 14 at 4 (5th Cir. filed July 19, 1999)). This language was the same as that which now appears in section 3.2 of the use agreement. Specifically, section 3.2 provides that the "Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth areas to, from and at the [DFW] Airport, to the extent required by the terms of the . . . Ordinance." (American Pet. App. 41a). As this plain language reveals, the use agreements do *not* require the signatory airlines to operate all of their services at DFW Airport. Rather, they require the airlines to do so only to the extent required by the Ordinance.

REASONS FOR HOLDING THE CROSS-PETITION

1. Insofar as it challenges the Fifth Circuit's determination that the use agreements are preempted, the Board's Cross-Petition should be held because it is wholly derivative of the question presented in American's Petition. The Board does not dispute that the use agreements were "enacted to effect the Ordinance," (American Pet. App. 41a) and, just like the Ordinance, were designed to limit services at Love Field. The Fifth Circuit concluded that, because the Ordinance's restrictions on operations at Love Field exceeded the scope of the cities' "proprietary powers and rights" within the meaning of section 41713(b)(3) of the ADA, 49 U.S.C. § 41713(b)(3), such restrictions were preempted by section 41713(b)(1) of the ADA, 49 U.S.C. § 41713(b)(1). Because the Ordinance was preempted, the Fifth Circuit reasoned, section 3.2 of the use agreements, which required nothing more than compliance with the Ordinance, also exceeded the cities' proprietary powers and similarly was preempted. (American Pet. App. 41a). Accordingly, the Fifth Circuit's decision as to section 3.2 of the

use agreements followed directly from its decision as to the Ordinance.

This Court's resolution of the threshold question whether the Ordinance is preempted thus will dramatically affect the disposition of the Board's Cross-Petition. If the Court were to reverse the Fifth Circuit, as we believe it should, the first question would be moot. If the Court were to affirm the Fifth Circuit's decision, the question whether the ADA preempts section 3.2 of the use agreements – which does no more than require airlines to offer services "to the extent required by the terms of the . . . Ordinance" (American Pet. App. 41a) – would again be rendered insignificant because the Ordinance would be nullified. In sum, the use agreement issue adds nothing to the Court's ability to resolve the underlying preemption question except a needless layer of complexity.

2. The Board's claim that the use agreements were an exercise of proprietary rights does not create an independently reviewable issue. Although tacitly recognizing that the Ordinance and the use agreements were part and parcel of the cities' plan to reallocate the bulk of interstate passenger services to DFW Airport, the Board attempts to decouple the use agreements from the Ordinance by asserting that the former establish contractual obligations between the parties, contain terms not found in the Ordinance, and represent "permissible proprietary action" by the cities rather than an "impermissible attempt to regulate." DFW Board Cross-Pet. at 17; *id.* at 18 (use agreements were not "an act of government regulation"); *id.* at 19-20 (use agreements were "nonregulatory, proprietary contracts reflecting the circumstances unique to an airport such as DFW"). But the question is not whether the use agreements' provisions are labeled as "proprietary." Rather, the question is whether section 3.2 of the use agreements represents an

exercise of the cities' proprietary powers *even if* the Ordinance does not. In other words, the question is whether section 3.2 of the use agreements can meaningfully be distinguished from the underlying requirements of the Ordinance itself. Because both the Ordinance and the use agreements seek to achieve exactly the same goal – namely, restricting passenger service from Love Field – the answer to that question is no.

Nothing in *Associated General Contractors of America v. Metropolitan Water District*, 159 F.3d 1178 (9th Cir. 1998), or *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993), bolsters the Board's effort to decouple the Ordinance from the use agreements. To be sure, both cases (i) recognized that not every action of a state is tantamount to regulation and, (ii) drew careful distinctions between a state acting as any party might act, *e.g.*, to manage its own property, and a state acting in a regulatory capacity. *See Building & Construction Trades Council*, 507 U.S. at 231-32 (allowing government to require prospective contractors to adhere to a labor agreement as a condition of performing a project on government-operated land because Congress did not preclude government from "manag[ing] its own property when it pursues its purely proprietary interests" and because "analogous private conduct would be permitted"); *Associated General Contractors*, 159 F.3d at 1183 (same). The Fifth Circuit was well aware of this distinction and the cases on which the Board relies.[2] Again, however, these cases deal only with

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[2]*See* American Pet. App. 40a-41a (recognizing that "the case law distinguishes between actions a state or municipality takes in a proprietary capacity . . . and actions a state or municipality takes that are attempts to regulate," citing, *e.g.*, *Building & Trades Council* and *Associated Gen. Contractors*).

circumstances in which the government acts as a proprietor. They do not explain why, if the use agreements are no more than a mechanism by which an airport owner controls the traffic into its airport, the Ordinance is not also such a mechanism to precisely the same extent. In short, the cases on which the Board relies stand for the unremarkable proposition that not everything a city does is tantamount to regulation, and do not remotely suggest that the use agreements are "proprietary" for some reason that the Ordinance is not.

At bottom, the Board's Cross-Petition raises the same question that American's Petition raises: whether cities that own multiple airports in a single region are precluded by the ADA from designating one of those airports as the principal locale for commercial traffic in the area. That the action the Board challenges takes the form not of a local ordinance, but of an agreement to adhere to the local ordinance, is irrelevant. *See, e.g.*, *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 289 (1986); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1062 (9th Cir. 1987) ("[A] city may not use the guise of privity of contract to conduct otherwise forbidden regulatory activity."). Regardless of the form that a governmental action takes, the question remains whether such action is "proprietary" rather than "regulatory."

3. Nothing in this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), suggests that section 3.2 of the use agreements would avoid preemption if the relevant provisions in the Ordinance are held to be preempted. *Wolens* involved state-court suits by participants in American's frequent-flyer program alleging that American violated a state consumer-fraud statute and breached its contract with program participants by altering the program retroactively in such a way as to devalue the utility of frequent-flyer credits that the

plaintiffs already had accumulated. Although both the statutory claim and the contract claim arose from the same set of operative facts, and although both claims clearly related to price within the meaning of 49 U.S.C. § 41713(b)(1), the Court concluded that only the former claim was preempted by the ADA. 513 U.S. at 222. The Court explained that the consumer-fraud claim was preempted because the statute, even though a law of general applicability, "serves as a means to guide and police the marketing practice of the airlines." *Id.* at 228. The contract claim, however, escaped preemption because the terms and conditions of the frequent-flyer program were "self-imposed undertakings" for marketing purposes, *id.* at 228-29, and thus did not amount to the "enact[ment] or enforce[ment]" of "a law, regulation, or other provision having the force and effect of law" under 49 U.S.C. § 41713(b)(1). The Court concluded:

> The ADA's preemption clause . . . stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

513 U.S. at 232-33.

The Board, seizing on the distinction the Court made in *Wolens* between the fraud claim and the contract claim, asserts that the Fifth Circuit's conclusion that the use agreements are preempted "directly conflicts" with *Wolens*. DFW Board

Cross-Pet. at 13. According to the Board, *Wolens* dictates that the use agreements are enforceable because "voluntary, self-imposed contracts are not preempted by the ADA." *Id.* But the Board's suggestion that the obligations imposed by the use agreements were "voluntarily" assumed by the airlines is absurd. As the Board itself made clear in its Cross-Petition (at 6-9), the decision to relocate scheduled passenger traffic from Love Field to DFW Airport was a result of federal compulsion. The major carriers "agreed" to execute Letter Agreements – the forerunners of the use agreements – committing not to use Love Field only because the Board required airlines to execute such Agreements as a condition of using DFW Airport for passenger service. Had they not done so, these carriers effectively would have been foreclosed from the market. The Board's characterization of the carriers' agreements with the cities as "arms-length business transactions voluntarily made" thus ignores the fact that the use agreements were part and parcel of the Board's and cities' broader (and federally mandated) efforts to relocate commercial service to DFW Airport.

In any event, the Board's Cross-Petition rests on a serious misreading of both the holding and the analysis of *Wolens*. That case did not purport to adopt a categorical distinction between breach-of-contract claims and other state-law claims.[3] Rather, this Court's focus was on whether the claim – whatever its form – could be resolved without allowing the State to impose its own substantive standards or policies with respect to rates, routes, or services. *Wolens*, 513 U.S. at 232. If a State lacks the power to impose a certain regulation, it

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[3]Indeed, the Ordinance, which the Fifth Circuit found preempted, was itself the product of an agreement between the cities of Dallas and Fort Worth.

cannot evade preemption merely by incorporating the forbidden regulation into a contract. *See, e.g., Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 307-08 (1935) ("[W]hen contracts deal with a subject-matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."); *accord Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 692 (5th Cir. 1999) (recognizing that a government entity's use of contracting power to advance regulatory goals is preempted under NLRA and ERISA).

Moreover, even if *Wolens* had adopted a bright-line distinction between contract claims and other state-law claims, the Fifth Court's analysis still is perfectly consistent with *Wolens*. Even where a breach-of-contract claim is asserted, the *Wolens* Court emphasized, such a claim would be preempted if its resolution turned on an interpretation of "state laws or policies external to the agreement." 513 U.S. at 233. Here, the alleged contractual obligation undertaken by the airlines pursuant to section 3.2 of the use agreements was *not*, contrary to the Board's suggestion, to move their operations to DFW Airport. Rather, the airlines agreed merely to adhere to the terms of the Ordinance. The Ordinance, in turn, required the transfer of services from Love Field to DFW Airport, but only to the extent such transfer was "*legally permissible*." (American Pet. App. 162a) (emphasis added). The Fifth Circuit concluded that the ADA preempted the cities' ability to effect such a transfer under the Ordinance. It necessarily follows that no legally enforceable obligation arises under section 3.2 of the use agreements. *See, e.g., Nelson v. American Nat'l Bank*, 921 S.W.2d 411, 417 (Tex. App. 1996) (a preempted law is void and without effect). Accordingly, any attempt by the Board to prevent airlines from flying into Love Field would not be based

on the terms of the use agreements, but rather would be an "enlargement or enhancement based on state laws or policies external to the agreement." *Wolens*, 513 U.S. at 233.

Even under the Board's misreading of *Wolens*, then, the resolution of the question presented by American – whether the Ordinance is preempted – entirely controls the question whether section 3.2 of the use agreements is preempted. As a result, this Court should hold the Board's petition on this issue pending its resolution of the threshold question posed by American.

4. American does not disagree with the Board's claim that DOT's interpretation of subsection (a)(2) of the so-called Wright Amendment[4] is in error. Nevertheless, the Fifth Circuit's decision in this case neither conflicts with any decision of this Court or any court of appeals, nor raises any issue of nationwide importance, and thus does not warrant review at this time.

CONCLUSION

For the foregoing reasons, this Court should hold the Board's Cross-Petition pending resolution of American's petition.

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[4]Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35, 48 (1980).

Respectfully submitted,

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